PROCEEDINGS.

FOURTH SESSION.

THE Fourth Scientific Session of the Academy was held in Philadelphia on Thursday, the 12th of December, 1890, at 1520 Chestnut street, at 8 P. M.

Miss Henrietta Leonard read an abstract of the paper (No. 17), by Professor E. v. Böhm-Bawerk, of Vienna, on "The Austrian Economists," printed in the ANNALS, January, 1891.

The main subject for the evening was the discussion of the Original-package Decision. Professor C. Stuart Patterson gave a statement of the paper on the subject submitted by him, and printed in full in the ANNALS, October, 1890.

At the conclusion of his remarks, Mr. Henry Budd continued the discussion of the subject from a different point of view, speaking as follows:

In the decision under discussion two well-recognized governmental powers are involved: the *police power*, which may be defined as the right of a State to regulate its own internal concerns, including the right to regulate intercourse amongst its citizens; and what is known as the *commercial* power. The former has been expressly reserved to the States of the Union, and Congress has no right to exercise police power within the boundaries of any State.[1] The latter power is conferred upon Congress by Art. I. Sec. 8 of the Constitution: "Congress shall have power

[1] This is well illustrated by U. S. *v.* De Witt, 9 Wall. 41; Patterson *v.* Kentucky, 97 U. S. 501.

to regulate commerce with foreign nations and amongst the several States, and with the Indian tribes."

These two powers exist side by side generally in harmony; their coexistence does not imply the weakening of the authority or the impairment of the sovereignty of either State or Federal government. But when, in the course of their legitimate exercise, they conflict, the question comes, Which must give way? Which of the two sovereignties, the State or the Federal, must yield? Manifestly the State. It has long since been held that the State power of taxation cannot be permitted to interfere with commerce, and yet the power of taxation is as essential an element of sovereignty as the police power; indeed, it is a necessary condition of all government. The power of taxation (except as limited in Art. I. Sec. 10, Cl. 2, of the Constitution) has been as freely reserved to the States as has the police power, and, it is clear, the State has the right to lay a license or occupation tax. Nevertheless, when the occupation taxed was that of a seller of foreign commodities, the right of the State to collect the tax was promptly denied by the Supreme Court, because the tax, although nominally upon a person, affected the introduction into the country of foreign merchandise, the subject of commercial intercourse.[1] It is true that the goods in Brown *v.* Maryland were foreign to the country as well as to the State, but it is to be observed that the power to regulate external and that to regulate internal commerce are given by the same words, and it is matter of history that one of the strong inducements to the formation of a union was the general desire for commercial intercourse between the citizens of the different States which should not be liable to be interrupted or burdened at the caprice of any State legislature. Mr. Patterson argues that Brown *v.* Maryland only decides that where Federal and State powers of *the same kind* conflict, the former must be supreme; but this seems

[1] Brown *v.* Maryland, 12 Wheat. 419.

to confine the operation of the case within too narrow limits; for what difference can it make in a case of a conflict between a clear right of the Federal government and a clear right of the State, whether the conflicting rights are *iisdem generis*, or diverse? In either event, there is a conflict, and one must give way. This view is supported by the opinion of Marshall, C. J., in Gibbons *v.* Ogden.[1]

Now let us take a step further, and see whether in the case under consideration there is a conflict. Mr. Patterson has well and clearly stated the facts. Do the facts show an interference with commerce. Manifestly, yes. Interstate commerce does not mean simply the carrying of a commodity from one State to another and leaving it within the boundaries thereof; commerce implies the interchange of commodities between individuals, and interstate commerce means the bringing in of a commodity from another State so that it may be used or dealt with by a citizen of the State into which it comes. To quote Chief Justice Marshall: "Commerce is intercourse, and one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms with the intent that its efficiency should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose would the power to allow importation be given unaccompanied with the power to authorize a sale of the thing imported? *Sale* is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is an essential ingredient; as indispensable to the existence of the entire thing, then, as importation itself."

It is idle to say, therefore, that a prohibitory Act does not interfere with commerce or constitute a regulation thereof. The idea that, while a State could not regulate, it could destroy, has long since been exploded, and if an

[1] 12 Wheat. 220.

Act is, in effect, a regulation which affects the general subject of commerce, it must give way. I freely admit the power of a State to tax an imported commodity *after* it becomes part of the general wealth of the State, or to regulate its use after it has acquired that character; but it cannot acquire that character until it has ceased to be the subject of interstate commerce—until its commercial transit from one State to the other is complete. I admit, also, that acts of police power, which incidentally affect commerce have been permitted (Mr. Patterson states many of them); but, it is to be observed, they are all acts which affect matters essentially local, such as the enforcement of inspection laws, necessary for health, pilotage in particular harbors, etc., and are to be upheld upon the principle that where a commercial matter is such that different rules, *from a commercial point of view*, should obtain in different localities, then, where Congress has not acted, State action may be permitted; but where the matter is one requiring general legislation, then the silence of Congress is not to be regarded as a declaration that the States may do as they please. Now, nothing can be more general and need more uniform regulation than the question what shall be a *subject of commerce;* and when a State prohibits altogether the sale of an article, it declares that, so far as that State is concerned, that article shall not be a subject of commerce. To-day it is liquor: what may it be to-morrow? A State could thus exclude any commodity which she does not raise within herself without rendering herself amenable to the charge of discriminating against the product of other States.

It is true, Mr. Justice Harlan puts liquor on a different basis from anything else, not in itself noxious, and asks: "Suppose the people of a State believe, upon reasonable grounds, that the general use of intoxicating liquors is dangerous to the public peace, the public health, and the public morals, what authority has Congress to reverse their judgment?" etc. But would not the reasoning of

the learned judge apply as well to any article that a State might think dangerous to morals, health, and peace—as, for example, by encouraging luxury? and would not this, in effect, be to allow a State to determine, in a large measure, what should be subjects of commerce, and so lead to endless confusion?

In this connection, we must remember that, when the Constitution was adopted, liquor was a well-recognized article of commerce, and the fact that Congress has not since legislated upon it must be taken as a declaration that it is to remain so. It is not on a par with diseased rags and infected cattle, which of themselves carry disease; it produces harm by its abuse. But this consideration is outside the matter before us. We have here nothing to do with legislative policy, but merely with the question, Can an Act of a State which prohibits the sale of what is a generally recognized subject of commerce be upheld so far as it interferes with interstate commerce? It cannot, if the supremacy of the Federal Government in the powers granted to it is to be upheld, and the uniformity of regulation of commerce which was, *inter alia*, sought in the adoption of the Constitution is to remain secured.

With regard to the other point involved in the Original-package Decision, I quite agree with Mr. Patterson. Congress cannot give to a State Act the force of an Act of Congress: *delegatus non potest delegare.* If the State has not the right to override the commercial power, such right cannot be conferred upon it by anything short of an amendment to the Constitution, which, as it stands, gives to Congress no power to delegate the right of commercial regulation, to adopt State legislation *as such*, to declare a State statute valid when it is not valid without such declaration, or to give new powers or restore to the States powers which they have yielded or surrendered to the Federal Government at the time of the adoption of the Constitution.

Mr. A. H. Wintersteen continued the discussion. He said:

The two uppermost subjects of discussion in the domain of constitutional law of recent years have been the relation of Government to the individual and the relation of State to National governmental power under our system. It is now established law that the States, as governments, while not absolute in the sense of possessing arbitrary power, have so wide an area of power over the individual that they may, for public purposes, by the recognized agencies within due process of law, control him very materially in the exercise of his liberty and in his possession and use of property. As Justice Woodbury once observed, the States, as political bodies, may decide what kind of property and business they will tolerate and protect—when they have complete jurisdiction over the subject-matter.

But however absolute the States may be in legislation as to their own internal concerns, no portion of their power is exercisable so as impair the grant of powers to the Federal Government.

The commerce clause of the Federal Constitution is a grant of exclusive power to Congress where the subjects of the power are national or admit of uniformity of regulation. Commerce includes intercourse and traffic, the sale and exchange of commodities. The sale and exchange of commodities among the States is as much a National subject as is foreign commerce. The silence of Congress in the matter of the regulation of interstate exchange of commodities is equivalent to a declaration that it shall remain unrestricted, unobstructed, and free. What are and what are not articles of interstate commerce it is obviously for Congress to decide, and its silence as to the inhibition of any specific article, is equivalent to a presumption that the thing is a commercial article in accordance with established usage. The States may not exclude from their borders as non-commercial articles

what are not generally recognized as such, or what have not been so declared by Congress; for otherwise they could exclude anything their own local policies should suggest, to the extent of a practical loss of the freedom of interstate commerce.

The present immediate question: Whether the State's sovereign power of legislation, a phase of which appears in its police power, extends to the prohibition of the sale of intoxicating liquor in the original package by the person who introduces it into the State from another State, was practically settled in 1888, when the Supreme Court decided in the Bowman case that a State could not prohibit the introduction of such articles into its borders. If the right to bring in exist, the broader view is that that right is endowed with some potency, and is not a mere barren right. When Chief Justice Marshall declared that the Federal power stops not at the external boundaries of a State, but penetrates within its borders to the extent necessary to make the power effective, he established a principle which not only made possible, but made necessary some such test as the original-package test, for determining the limits of the State and Federal realms. The value of the original-package test, as applied to interstate commerce cases, is that it fixes a line beyond which the State may not go in legislation: when the specific act of legislation is of a character to interfere with or impede commerce. When the State of Iowa proposed altogether to prohibit the manufacture and sale of certain commercial articles, known as intoxicating liquors, there was a distinct attempt to interfere with traffic or exchange in those commodities, and, if the articles in question could not be shut out from the State, the point where they passed within the State's jurisdiction it was obviously necessary to declare. What more natural, what more logical, what more necessary a proposition, than that they must first be mingled with the mass of State property? And what better evidence of this, if an arbitrary limit must be made,

than the breaking of the package or the sale of it within the State? Unless some such limit were made, we have the Federal grant of power, and what it implies of immunity from State interference, stopping at the State line, and the commercial act of bringing the article into the State, in the exercise of the trader's or dealer's commercial function, practically inhibited by his deprivation of all market for his wares.

The only real question, after all, therefore, is whether the State may prohibit the introduction of intoxicating liquors within its borders from other States. There is but one proposition to be considered in seeking an answer to the question, namely, whether intoxicating liquors, under the policy of the nation, are legitimate commercial articles. If they are, then the States may not inhibit them. We need only reflect that they have been traded in as such ever since we have been a nation, and that the statute books of the United States recognize them a hundred times as articles of commerce. A State now comes along and declares the contrary. It may, perhaps, be granted that its policy is advanced and in the interest of a better civilization. But it may not civilize in that way or to that extent. The grant of power to Congress to regulate commerce was made because there were thirteen civilizers already in the field, each civilizing in its own way—but principally by the Chinese-wall method—and it was thought, not merely desirable, but absolutely necessary, to make the National government the one civilizer in matters of interstate commerce. Suppose each one of the original thirteen States had been permitted to declare what articles of commerce it would admit within its borders. How long would it have been, in that age of State jealousy, before the articles grown or produced in particular States would alone have found favor with the legislatures of those States? And we would not long continue to be the great nation we to-day are if there were forty different series of commercial articles, each series recognized by one

State and by no others. Suppose some State legislature should determine that a pork diet did not make good citizens, and should conclude to abolish the traffic in hogs. In the present divided state of opinion as to the benefits of pork as a meat, it would possibly be within due process of law for a State, by appropriate legislation, to discourage the growth of hogs. But would it seriously be pretended that any State could prevent healthy hogs from being brought across its borders? So we say to Iowa, in the absence of Congressional legislation, in the language of Sir Toby,

"Dost thou think, because *thou* art virtuous, there shall be no more cakes and ale?"

The justification of the Iowa legislation is sought in the "appalling array of poverty, disease, and crime," directly attributable to intoxicating liquors. The answer to this as an argument is, that it is for Congress to recognize this and to declare, as practically it has declared in the Wilson bill, that intoxicating liquors are not necessarily free commercial articles. The danger of giving any State the power, without Congressional action, to exclude articles of commerce, because of policies peculiar to itself, would be too great if once admitted.

But it is said that nitro-glycerine, gunpowder, and other recognized commercial articles are the subject of the State's police power at State lines and in original packages. But it has yet to be decided that either nitro-glycerine or gunpowder, without authority of Congress, can be altogether excluded from the State and altogether enjoined from sale in original packages. It may be observed that the Act of Congress of 1866 withdrew nitro-glycerine from the category of a free commercial article, and specifically made it subject to the State police power at the State line.

It has often been said, the Justices of the Supreme Court of the United States must be statesmen as well as lawyers. Their function is to construe a written and, in some respects,

a rigid Constitution; but their function is also to recognize conditions of society which make the words of that Constitution applicable or not applicable according to the development of the people's thought and life. All that they have done in these recent liquor cases is to see and to say that, in the progressive thought of the age, intoxicating liquors have not yet passed wholly into the category of public nuisances. They have preferred to leave it to the national legislature to say so. That they are right in their position, is proven by the defeat of prohibitory amendments, by overwhelming popular majorities, in almost every State in which the people have been asked to express their minds on the subject. "The people are not not always right; the people, Mr. Grey, are seldom wrong."—*Vivian Grey.*

The terrors the alarmist sees in the possibilities of the original-package man flooding a prohibition State with his obnoxious wares, constitute no argument. For he altogether misses the point that the Constitution of the United States was not framed for the enforcement of State policies. It was to break away from the restraints of State policies that we, the people, formed this "more perfect union." It would be writing the old Confederation into the Constitution, and overruling the judgments of the greatest expounders of this instrument, were we to test its meaning by the standard of the convenience or inconvenience of one of the States. It would be sacrificing it upon the now decayed altar once erected by the high priests of a discarded political faith.

Mr. William D. Lewis argued further for the propriety of the decision, and Mr. Samuel W. Cooper called the attention of the Academy to the chaotic state of the law on the point in question, which resulted from different rulings of the Supreme Court in two cases involving the same question, namely, the Oleomargarine Case and the decision under discussion.

FIFTH SESSION.

The Fifth Session of the Academy was held in Philadelphia on Wednesday, the 14th of January, at the Art Club, at 8 P. M.

Dr. John S. Billings, of the United States Army, delivered an address on "Public Health and Municipal Government." The address has been issued as a supplement to the ANNALS, with the date February, 1891.

SIXTH SESSION.

The Sixth Session of the Academy was held in Philadelphia on Thursday, the 12th of February, at 1520 Chestnut street, at 8 P. M.

The Secretary announced that the following papers and communications had been submitted to the Academy:

28. By Professor William C. Morey, of the University of Rochester, on "The Genesis of a Written Constitution." Printed in the current ANNALS.

29. By Professor Charles A. Tuttle, Amherst College, on "The Wealth Concept: A Study in Economic Theory." Printed in the current ANNALS.

30. By Frederick William Holls, Esq., of New York, on "Compulsory Voting." Printed in the current ANNALS.

31. By Professor Francis N. Thorpe, of the University of Pennsylvania, on "Recent Constitution Making."

32. By Rev. C. E. Walker, Minnesota, on "The Rights of Citizens and the Treatment of Criminals."

33. By R. M. Black, of West Gardner, Mass., on the "Ethics of the Declaration."

34. By H. Friedenwald, on the "British Economic Association."

35. By A. F. Chamberlain, of Clark University, on "Pitons, a Canadian Substitute for Money."

The President introduced Mr. Holls, who read his paper on "Compulsory Voting."

At the conclusion of the paper, Dr. Falkner called the attention of the Academy to the importance of the problem, and to the widespread interest in the solution proposed by the speaker. Letters from Mr. Chilton, of Baltimore, and Mr. Charles H. Reeve, of Indiana, showed the interest in the matter in those sections of the country.

Mr. S. W. Cooper spoke of the growing indifferentism in politics to be observed among the classes best fitted to form a judgment in political matters. This is an ominous sign for the future of the country. A democracy is a good government when the people exercise their rights, but when they neglect them it becomes a dangerous form of government. Under these circumstances the professional politician becomes the arbiter of public affairs. Such a measure as has been proposed might accomplish very valuable results, and, whether or not it is the final solution of the difficulties under which we are laboring, it deserves a trial.

Professor F. H. Giddings said the paper has a very great importance, both in its practical bearings and in its theoretical aspects. The figures which have been quoted show how terribly the most serious interests of the Republic may be menaced at any moment by the failure of the citizens to perform the most sacred trust which they have accepted. The trust is accepted, for an argument could be made in favor of the proposition that every man who declines to vote has violated his duty to support the Constitution and the laws. On the practical side, I am disposed to think a law of the kind suggested would be far more effective than many of those think who look at the difficulties of enforcing such fines or other penalties. On the theoretical side, the right to compel the voter to exercise the franchise is clearly stated in the paper. The vote is a trust, and must be performed.

Mr. Avery D. Harrington asked what effect such a measure would have on the poll tax? For his part, he

thought that the more expensive the privilege of voting was made the more it would be appreciated.

Rev. Mr. Bull insisted on the Australian Ballot Law as the preliminary to the proposed measure. If the measure proposed, which forced a man to vote, should prove an obstacle in the way of forming new parties, he should be opposed to it.

Mr. Jacob Reese favored compulsory voting. The measure proposed was like the militia tax which existed in his youth: all citizens had to go out and march, or be taxed.

Ex-Judge Amos Briggs said: I am in favor of the proposition that runs through the centre of the paper. I am in favor of compulsory voting, and I would extend it to every person who is affected by the law. I would not exclude from it any rational creature coming under the operation of the law, whether the person be of the male or female sex, if they had to pay a tax. Those who are amenable to the law, who pay taxes, should have a share in the making of the law, its alteration, or appeal. They have such an interest in the law that it imposes on them the duty of going to the polls. If they do not feel this interest as members of the community, as sovereign members of the Republic, then they ought to be coerced to discharge the duty.

A member spoke of the need of compulsory education, if we were to have compulsory voting. It cannot be forgotten that all persons would be forced to vote, and such instruction as might fit them for it is absolutely necessary. This applies with double force to the large foreign element.

Mr. Holls, in reply, said that under a compulsory voting system, if effective, the vote on such questions as prohibition and others which are submitted to the people would be a complete expression of the popular opinion, and not, as now, that of merely a part of the voters. It has been said that unless the person privileged qualifies as a voter, he is not subject to the law. Now, on the other hand, it is the clear duty of every citizen over twenty-one years of

age to qualify. Another phase of the question is very important. In New York the foreign element is very prominent, and is able, as things stand, to decide national as well as local elections. The effect of the compulsory voting measure would, in my opinion, be to bring out the American vote. That this is highly desirable none, I think, will contradict.